No. 18-2611

THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MISSOURI BROADCASTERS ASSOCIATION, et al.,

Plaintiffs–Appellees,

v.

DOROTHY TAYLOR, et al.,

Defendants–Appellants.

On Appeal from the United States District Court for the
Western District of Missouri
Civil Case No. 2:13-CV-04034-MDH – Honorable M. Douglas Harpool

---

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF MISSOURI, THE FREEDOM CENTER OF MISSOURI, AND THE CATO INSTITUTE

IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

Anthony E. Rothert
Jessie Steffan
Gillian R. Wilcox
ACLU of Missouri
906 Olive Street, Ste. 1130
St. Louis, Missouri 63101
(314) 652-3114

Ilya Shapiro
Trevor Burrus
Cato Institute
1000 Mass. Ave. NW
Washington, DC 20001
(202) 842-0200

David E. Roland
Freedom Center of Missouri
P.O. Box 693
Mexico, Missouri 65265
(573) 567-0307

CERTIFICATE OF INTERESTED PERSONS & CORPORATE DISCLOSURE

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, *amici* certify that persons interested in this case are those listed in the party briefs, along with the ACLU of Missouri, Freedom Center of Missouri, and Cato Institute. *Amici* are nonprofit corporations, have no parent corporations, and are not publicly held.

Table of Contents

Certificate of Interested Persons and Corporate Disclosure 1

Interests of *Amici Curiae* 7

Argument.....9

I. THE *CENTRAL HUDSON* FACTORS ARE NEITHER GROUNDED IN CONSTITUTIONAL TEXT NOR CREATE A CONSISTENT STANDARD FOR COMMERCIAL SPEECH REGULATION.....10

A. The First Amendment Does not Treat Commercial Speech Differently Than Other Types of Speech 16

B. There Is No Clean Way to Differentiate Commercial Speech and Other Types of Speech..... 23

II. APPELLEES PREVAIL UNDER EITHER STRICT SCRUTINY OR *CENTRAL HUDSON* 355

A. The State Does Not Present a Substantial Interest for the Challenged Statute Under Either Test..... 355

B. Even If the Government Interests Are Found To Be Sufficient, Under the General First Amendment Test, the Purported Government Interest Does Not Justify Censorship 37

C. Even If the Case Is Evaluated Under the *Central Hudson* Test, the Government Cannot Show that Censorship Advances Its Asserted Interests, Nor That It Is Narrowly Tailored to Those Interests.....39

Conclusion 43

Certificate of Compliance 46

Certificate of Service 47

TABLE OF AUTHORITIES

Cases

1-800-411-Pain Referral Service, LLC v. Otto,
744 F.3d 1045 (8th Cir. 2014) 23

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996) ..... *passim*

BellSouth Telecomms., Inc. v. Farris,
542 F.3d 499 (6th Cir. 2008) 31

Bigelow v. Virginia,
421 U.S. 809 (1975) 13, 14, 30, 32

Bolger v. Young Drug Prods. Corp.,
463 U.S. 60 ..... 21, 35

Buckley v. Valeo,
424 U.S. 1 (1976) 25

Cammarano v. United States,
358 U.S. 498 (1959) 10

Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n,
447 U.S. 557 (1980) ..... *passim*

City of Cincinnati v. Discovery Network, Inc.,
507 U.S. 410 (1993) ..... *passim*

Cohen v. *California*,
403 U.S. 15 (1971) 25

Dana's R.R. Supply v. Attorney General, Fla.,
807 F.3d 1235 (11th Cir. 2015) 36

Edenfield v. Fane,
507 U.S. 761 (1993) 21, 31

Granholm v. Heald,
544 U.S. 460 (2005) 36

Greater New Orleans Broadcasting Ass'n, Inc. v. United States,
527 U.S. 173 (1999)..... 14, 40, 42

Ibanez v. Fla. Dep't of Bus. & Prof'l Reg.,
512 U.S. 136 (1994)..... 36

Jones v. City of Opelika,
319 U.S. 103 (1943); 319 U.S. 584 (1942) 13, 28

Joseph Burstyn, Inc. v. Wilson,
343 U.S. 495 (1952)..... 25

Leach v. Carlile,
258 U.S. 138 (1922)..... 17

Lehman v. City of Shaker Heights,
418 U.S. 298 (1974)..... 13

Linmark Associates, Inc. v. Willingboro,
431 U.S. 85 (1977)..... 24, 26

Lorillard Tobacco Co. v. Reilly,
121 S. Ct. 2404 (2001)..... 42

Mo. Broadcasters Ass'n v. Lacy,
846 F.3d 295 (8th Cir. 2017) 38, 40, 41

New York Times v. Sullivan,
376 U.S. 254 (1964)..... 11, 25

Nordyke v. Santa Clara Cty.,
110 F.3d 707 (9th Cir. 1997) 31

North Dakota v. United States,
495 U.S. 423 (1990)..... 36

Ohralik v. Ohio State Bar Ass'n,
436 U.S. 447, 455 (1978) (1978)..... 14

Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,
413 U.S. 376 (1973)..... 12, 25

Posadas de P.R. Assocs. v. Tourism Co.,
478 U.S. 328 (1986)..... 21, 23

R.A.V. v. City of St. Paul,
505 U.S. 377 (1995)..... 22

Reed v. Town of Gilbert,
135 S. Ct. 2218 (2015)..... 37, 38, 39

In re R.M.J.,
455 U.S. 191 (1982)..... 15

Rosenbloom v. Metromedia, Inc.,
403 U.S. 29 (1971)..... 11

Rubin v. Coors Brewing Co.,
514 U.S. 476 (1995)..... 19, 35, 41, 42

Schneider v. Town of Irvington,
308 U.S. 147 (1939)..... 17

S. Wine & Spirits of Am., Inc. v. Division of Alcohol & Tobacco Control,
731 F. 3d 799 (8th Cir. 2013)..... 36

Smith v. California,
361 U.S. 147 (1959)..... 25

Sorrell v. IMS Health Inc.,
564 U.S. 552 (2011)..... *passim*

Spence v. Washington,
418 U.S. 405 (1974)..... 13, 24

Talley v. California,
362 U.S. 60 (1960)..... 10, 11

Thompson v. Western States Med. Ctr.,
535 U.S. 357 (2002)..... 15, 43

United State v. United Foods, Inc.,
533 U.S. 405 (2001)..... 15

United States v. Alvarez,
567 U.S. 709 (2012) 28

Utah Licensed Beverage Ass'n v. Leavitt,
256 F.3d 1061 (10th Cir. 2001) 42

Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.,
425 U.S. 748 (1976) ..... *passim*

Valentine v. Chrestensen,
316 U.S. 52 (1942) 10, 11, 13, 18

Whitton v. City of Gladstone,
54 F.3d 1400 (8th Cir. 1995) 37, 38

Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,
471 U.S. 626 (1985) 31

Statutes

Mo. Rev. Stat. § 311.015 35

Mo. Rev. Stat. § 311.070.1 ..... 35, 37

Regulations

Mo. Code Regs. Tit. 11 § 70-2.240(5)(G) 35, 37

Mo. Code Regs. Tit. 11 § 70-2.240(5)(I) 35, 37

Other Authorities

Brian J. Waters, *A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the* Central Hudson *Test for Commercial Speech*,
27 Seton Hall L. Rev. 1626 (1997) 16

Commercial Speech,
107 Harv. L. Rev. 224 (1993) 30

Alex Kozinski & Stuart Banner, *Who's Afraid Of Commercial Speech?*,
76 Va. L. Rev. 627 (1990) ..... *passim*

INTERESTS OF *AMICI CURIAE*

The American Civil Liberties Union of Missouri (ACLU of Missouri) is a nonprofit, nonpartisan organization with more than 19,000 members dedicated to defending the principles embodied in the U.S. Constitution and our nation's civil rights laws. Since 1920, the ACLU of Missouri and its predecessor entities have been devoted to free speech, writing, publication, assembly, and thought. Through direct representation and as *amicus curiae*, the ACLU of Missouri regularly engages in state and federal litigation to protect free speech, including the right of the public to have robust access to information.

The Freedom Center of Missouri is a nonprofit, nonpartisan constitutional litigation center focused on helping citizens and those in positions of power to understand and respect the importance of individual liberty and on persuading courts to enforce constitutional protections for the freedoms enumerated in the U.S. and Missouri Constitutions. Since its founding in 2010, the Freedom Center has prioritized protecting the freedom of expression in all of its facets.

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those

ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

Amici submit this brief principally to address the prudence and constitutionality of the *Central Hudson* test.[1]

[1] All parties have consented to the filing of this brief. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than *amici*, their members, and their counsel—contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

Almost four decades ago, in the case now known as *Central Hudson*, the Supreme Court decided that government restrictions on "commercial" speech were owed more deference than restrictions on "noncommercial" speech. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562–63 (1980).

The test set out in *Central Hudson* has four steps. First, as an initial matter, courts determine whether the prohibited commercial speech promotes unlawful activity or is misleading. *Id.* at 564. Second, if not, courts decide whether the government interest underlying the prohibition is substantial. *Id.* Third, courts consider whether the prohibition directly advances the government's asserted interest. *Id.* Fourth, courts decide whether the restriction is more extensive than necessary to further the government's asserted interest. *Id.* If the government fails to carry its burden, the prohibition cannot stand.

Although Appellees prevail under the *Central Hudson* test, its central premise—that "commercial" speech warrants less protection than "noncommercial" speech—has created indefensible doctrinal inconsistency. *Central Hudson* set out an ill-conceived, groundless standard inconsistent with the First Amendment and with the ideals it animates. The line between commercial speech and noncommercial speech is indefinable, making the *Central Hudson* test both over- and underinclusive in practice. Ultimately, the test should be abandoned

because it implicitly endorses a form of censorship that leaves the American public less informed and less free to express itself through speech.

I. THE *CENTRAL HUDSON* FACTORS ARE NEITHER GROUNDED IN CONSTITUTIONAL TEXT NOR CREATE A CONSISTENT STANDARD FOR COMMERCIAL SPEECH REGULATION

Since constitutional antipathy toward commercial speech was first invented during World War II, the Supreme Court has been backing away gradually from that position. In *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), a commercial handbill case, the Court held baldly that there was no protection for commercial speech. By the following decade, a concurring Justice Douglas—whom no one could accuse of corporatism—called the *Valentine* decision "casual, almost offhand," remarking that it "ha[d] not survived reflection." *Cammarano v. United States*, 358 U.S. 498, 513–15 (1959) (Douglas, J., concurring) (commenting that "[t]he profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise"). The next year, in another handbill case, three more dissenting justices expressed concern about how *Valentine* could be squared with the Court's other speech cases. *Talley v. California*, 362 U.S. 60, 71 (1960) (Clark, J., dissenting, joined by Frankfurter & Whittaker, JJ.). The justices pointed out that the majority decision, when taken alongside *Valentine*, endorsed the puzzling outcome where a handbill "designed to destroy the business of a commercial establishment" was afforded substantially

more protection than the promotional handbills of the commercial establishment itself. *Id.*

In the landmark *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court was forced to distinguish *Valentine* before moving on to consider the contours of defamation. Even though the handbill at issue in *Valentine* had advertising on one side and grievances on the other, the Court found its application "wholly misplaced" to the advertisement *containing* grievances that had been placed in the Times. *Id.* at 265. Ultimately, the Court dismissed as "immaterial" the fact that the newspaper had profited from publishing the advertisement. *Id.* at 266 (holding that the statements at issue did "not forfeit [constitutional] protection because they were published in the form of a paid advertisement").

In 1971, despite the clarity of the *Valentine* decision,[2] a plurality expressly disclaimed any "view on the extent of constitutional protection, if any, for purely commercial communications made in the course of business." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 n.12 (1971), *abrogated on other grounds by Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 329 (1974).

[2] Whatever its correctness, *Valentine* had the benefit of being unambiguous. *See Valentine*, 316 U.S. at 54 ("This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and [the states and municipalities] may not unduly burden or proscribe [using the streets for these purposes]. **We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising**.") (emphasis added).

Valentine was briefly resurrected two Terms later in a decision that considered whether grouping Pittsburgh newspaper employment ads in columns labeled "Male Help Wanted" and "Female Help Wanted" violated the city's nondiscrimination ordinance and, in turn, whether enforcement of that ordinance violated the First Amendment. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). After a lengthy discussion of whether the employment listings at issue were more like *Valentine* advertising or *Sullivan* advertising, the Court ruled that *Valentine* controlled. The newspaper had argued, logically, that "if this package of advertisement and placement is commercial speech, then commercial speech should be accorded a higher level of protection." *Id.* at 388. But the Court rejected the newspaper's invitation to "abrogate the distinction between commercial and other speech," holding cautiously that "[w]hatever the merits of this contention may be in other contexts," it was unpersuasive where the advertising—which the city had found illegally discriminatory—was unlawful. *Id.* at 388–89.

The *Pittsburgh Press* Court's struggle to reconcile *Valentine* with subsequent speech cases apparently caused widespread recognition on the bench that it would continue to create doctrinal irregularities at the margins. In a pair of opinions issued at the end of the following Term, seven dissenting justices (including Justice Powell, the *Pittsburgh Press* author) noted that there was "some

doubt concerning whether the 'commercial speech' distinction announced in *Valentine* retains continuing validity." *See Lehman v. City of Shaker Heights*, 418 U.S. 298, 314 n.6 (1974) (Brennan, J., dissenting, joined by Stewart, Marshall, and Powell, JJ.); *Spence v. Washington*, 418 U.S. 405, 419, 419 n.2 (1974) (Rehnquist, J., dissenting, joined by Burger, CJ. & White, J.). Although the justices differed considerably on where First Amendment protections should apply, they shared doubts about whether a clear line could be drawn between commercial and noncommercial speech.[3]

In 1975, for the first time, the Court adopted Justice Douglas's observation that *Valentine* had not "survived reflection" into a majority opinion. *Bigelow v. Virginia*, 421 U.S. 809, 819–26, 820 n.6 (1975) (discussing commercial-speech cases and holding that *Valentine* "obviously [did] not support any sweeping proposition that advertising is unprotected per se"). The following year, the Court finally overruled *Valentine* outright, calling the advertising/nonadvertising

[3] In fact, the seeds of doubt about whether commercial and noncommercial speech could be wholly separate were present even at the time *Valentine* was decided. That same year, the Court upheld a handbilling *fee* as against a First Amendment challenge, reasoning that even "teachers and preachers" had some pecuniary interests, and "the financial aspects of their transactions need not be wholly disregarded." *See Jones v. City of Opelika*, 316 U.S. 584, 596 (1942) (admonishing that "[c]ommercial advertising cannot escape control by the simple expedient of printing matter of public interest on the same sheet or handbill"); *see also Valentine*, 316 U.S. at 55 (predicting that if conviction were overturned on basis that handbill included public information, "every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command"). *Jones* was summarily reversed the following year. 319 U.S. 103 (1943).

distinction "simplistic," and concluding that *Bigelow* had made clear "the notion of unprotected 'commercial speech' [had] all but passed from the scene." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 758–60 (1976). After summarizing its precedents, the *Virginia Pharmacy* Court held squarely that commercial speech was entitled to First Amendment protection, explaining why the public has a strong interest in the free flow of commercial information. *Id.* at 763–65 (holding that, at least sometimes, availability of commercial information may result in "alleviation of physical pain or the enjoyment of basic necessities" by a given individual and that, collectively, an "intelligent and well informed" populace is necessary to the preservation of "a predominantly free enterprise economy").

Yet the Court was still unprepared to give commercial speech the *same* level of protection it had bestowed on noncommercial speech. It was convinced that elevating commercial speech would ultimately result in devaluing *all* speech. *See, e.g.*, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455 (1978) ("Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression."). Instead, in *Central Hudson*, the Court announced a novel form of

intermediate scrutiny to which commercial-speech restrictions would now be subjected. 447 U.S. at 561–66.

The post-*Central Hudson* cases look a lot like the post-*Valentine* cases: a handful of straightforward applications, followed by a series of decisions modifying or limiting the test. As new kinds of hybrid speech—and new kinds of government regulation—have come to the Court's attention over the past few decades, it has again gradually distanced itself from the two articles of faith that underlay *Valentine* and remain at the center of the *Central Hudson* test: that there is always a "commonsense" distinction between commercial and noncommercial speech and that there is always a reason to subordinate the former to the latter.[4]

---

[4] *E.g.*, *In re R.M.J.*, 455 U.S. 191, 203 n.15 (1982) (noting that *Central Hudson* must be applied "with the understanding" that advertising for professional services has "special characteristics"); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422–23 (1993) (criticizing city newsrack regulations that turned on whether a publication was commercial, commenting that "it is clear that much of the material in ordinary newspapers is commercial speech and, conversely, that the editorial content in respondents' promotional publications is not what we have described as 'core' commercial speech," and remarking that whatever distinguished the two under the Court's precedents was merely "a matter of degree"); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality) (moving away from a *per se* application of *Central Hudson* to commercial speech, commenting that "[t]he mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them"; instead, "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands"); *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 193–94 (1999) (applying *Central Hudson* to strike down broadcast-advertising rules and cautioning that "[e]ven under the degree of scrutiny that we have applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment"); *United State v. United Foods, Inc.*, 533 U.S. 405, 409–10 (2001) (recognizing that the Court's decision to "accord less protection to commercial speech than to other expression" had "been subject to some criticism"); *Thompson v. Western States*

Most recently, in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011)—discussed in more detail below—the Supreme Court signaled that it was prepared to return to a strict scrutiny test for content-based commercial speech. *Id.* at 563–72. Lower courts should learn from the Court's retreat from *Valentine*, follow *Sorrell*'s guidance, and subject commercial-speech restrictions to the same First Amendment test as other types of speech regulations.

A. The First Amendment Does not Treat Commercial Speech Differently Than Other Types of Speech

The continued used of the *Central Hudson* test for commercial speech perpetuates an interpretation of the Constitution contrary to the goals and ideals it espouses. The First Amendment aims to instill "more speech, not less speech." Brian J. Waters, *Comment: A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the* Central Hudson *Test for Commercial Speech*, 27 Seton Hall L. Rev. 1626, 1644–45 (1997) (citing opinions by Justices Holmes and Brandeis). Categorically devaluing certain kinds of speech—including commercial speech—does the opposite. *See Sorrell*, 564 U.S. at 564 (classifying pharmaceutical-marketing law as content based because it "disfavor[ed] marketing, that is, speech with a particular content").

Med. Ctr., 535 U.S. 357, 367–68 (2002) ("Although several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases, there is no need in this case to break new ground.") (internal citations omitted).

Even in cases that ostensibly rely on the *Central Hudson* framework, the Court has repeatedly acknowledged that the supposed need for a separate, less exacting commercial-speech standard is not always obvious. *See, e.g.*, *id.* at 571; *Discovery Network*, 507 U.S. at 422–23; *44 Liquormart*, 517 U.S. at 501 ("[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands."). In fact, in *Sorrell*, the Court declined to decide whether all of the speech regulated by the challenged state laws was "commercial."

1. The commercial speech doctrine is not grounded in either the text or purpose of the First Amendment.

Having a distinct test, as ratified by the Supreme Court in *Central Hudson*, is not grounded in the text of the First Amendment. Indeed, the *Valentine* Court, which created the commercial/noncommercial distinction out of whole cloth,[5]

[5] The 1939 *Schneider v. Town of Irvington* seems to be the first decision explicitly distinguishes the two categories vis-à-vis the First Amendment. *See* 308 U.S. 147, 165 (1939) (cautioning that its decision to vacate convictions of religious solicitors under anti-handbill ordinance did not necessarily mean "commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires").

In fact, not long before *Schneider*, Justices Holmes and Brandeis had dissented from a decision upholding a postmaster "fraud order" that operated to ban an advertiser from using the mail, concluding the statute authorizing the fraud order violated the First Amendment. *See Leach v. Carlile*, 258 U.S. 138, 140 (1922) (Holmes, J., dissenting, joined by Brandeis, J.) ("If the execution of this law does not abridge freedom of speech I do not quite see what could be said to do so."). The majority decision did not address the First Amendment. But neither it nor the dissent turned on the commercial nature of the advertiser's speech. The dissenters were apparently untroubled by the fact that the fraud order had been directed at speech everyone agreed was purely commercial advertising, focusing instead on the "control of the post." *Id.* at

failed to provide any support whatsoever. Instead, it settled the issue in a sentence. 316 U.S. at 54. Although *Valentine*'s zero-protection rule was overruled by *Virginia Pharmacy* and then supplanted by intermediate scrutiny, *Central Hudson* took up the commercial/noncommercial distinction without seriously addressing whether the distinction was either contemplated by the First Amendment or desirable in a free society. *See Central Hudson*, 447 U.S. at 562–63, 562 n.5 (explaining that commercial-speech prohibitions should be evaluated with more deference because earlier decisions had presumed a "commonsense distinction" between commercial and noncommercial speech or had "rested on the premise" that subjecting commercial-speech regulations to strict scrutiny "could invite dilution" of the First Amendment without considering evidence in support of that prediction).

Nor did the Framers intend for commercial speech to be treated differently from other types of speech. Although the Framers did not specifically articulate that commercial speech would be protected, an argument along these lines:

> proves too much. The Framers never expressed an interest in protecting literature either, but the idea that the first amendment protects artistic expression is not one that attracts much opposition. The Framers were unconcerned with door-to-door proselytizing, but it seems that most people are happy to let the first

141. In fact, Justice Holmes wrote, "I think [the statute authorizing the fraud order] abridged freedom of speech on the part of the sender of the letters and that the appellant had such an interest in the exercise of their right that he could avail himself of it **in this case**." *Id.* (emphasis added).

> amendment protect that. The Framers evidenced no apprehension that, without the first amendment, government would tyrannically suppress the practice of nude dancing, but nude dancing falls within the scope of the first amendment as well.

Alex Kozinski & Stuart Banner, *Who's Afraid Of Commercial Speech?*, 76 Va. L. Rev. 627, 632–33 (1990).

Rather than being justified by constitutional text, the doctrine was borne out of policy concerns championed by the politicians of the day. "The *Central Hudson* test was created during the peak years of the consumer movement. In these pre-Reagan years, governmental regulation of consumer affairs was expected. Beginning with President Lyndon Johnson in 1964, protection of consumers was often sought to be accomplished through advertising restrictions." Waters, 27 Seton Hall L. Rev. at 1636 n.62 (internal citations omitted).

In light of this background, courts applying *Central Hudson* should insist that the government interest supporting a speech prohibition have "some justification tailored to the special character of commercial speech." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 492 (1995) (Stevens, J., concurring). Without that kind of justification, "the Government should not be able to suppress the same truthful speech merely because it happens to appear on the label of a product for sale." *Id.*

The central premise of the *Central Hudson* decision presumes "that protecting commercial speech is unwise because it will dilute the protection

afforded to noncommercial speech . . . caus[ing] some sort of leveling process, which will inevitably drain some protection from noncommercial speech." Kozinski & Banner, 76 Va. L. Rev. at 648. This argument assumes that protection of speech is finite, meaning that protection in one area will limit protection in the other. To the contrary, reinforcing the value of free flow of commercial information serves only to bolster speech protection broadly. *See, e.g.*, *Va. Pharmacy*, 425 U.S. at 764–65 (providing examples of "commercial" advertisements "of general public interest" and concluding that although "not all commercial messages contain . . . a very great public interest element[, t]here are few to which such an element . . . could not be added"); *id.* at 765 n.20 (pointing out that the free flow of commercial drug-pricing information informs lawmaking on pharmaceuticals).

2. Since its inception, the commercial speech doctrine has been criticized, especially by members of the bench.

Just like with *Valentine*, individual justices began criticizing *Central Hudson* shortly after it was issued because of its adoption of the commercial/noncommercial speech distinction. Justice Blackmun, in particular, authored a pair of concurrences in commercial-speech cases just for the purpose of urging his fellow justices to abandon the test. *See, e.g.*, *Discovery Network*, 507 U.S. at 437 (Blackmun, J., concurring ("I write separately because I continue to believe that the analysis set forth in Central Hudson . . . affords insufficient

protection for truthful, noncoercive commercial speech concerning lawful activities . . . . The present case demonstrates that there is no reason to treat truthful commercial speech as a class that is less "valuable" than noncommercial speech."); *Edenfield v. Fane*, 507 U.S. 761, 777–78 (1993) (Blackmun, J., concurring) ("I again disengage myself from any part thereof, or inference therefrom, that commercial speech that is free from fraud or duress or the advocacy of unlawful activity is entitled to only an 'intermediate standard' of protection"). Other members of the Court have expressed similar disapproval. *See, e.g.*, *44 Liquormart*, 517 U.S. at 517 (Scalia, J. concurring, joined by Thomas, J.) (questioning whether *Central Hudson* has "nothing more than policy intuition to support it"); *Posadas de P.R. Assocs. v. Tourism Co.*, 478 U.S. 328, 350 (1986) (Brennan, J., dissenting) ("I see no reason why commercial speech should be afforded less protection than other types of speech where, as here, the government seeks to suppress commercial speech in order to deprive consumers of accurate information concerning lawful activity."); *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 81 (Stevens, J., concurring in judgment) ("I have not yet been persuaded that the commercial motivation of an author is sufficient to alter the state's power to regulate speech.").

In 2011, the *Sorrell* Court signaled that *Central Hudson* could be cast aside entirely in an appropriate case. 564 U.S. at 566. *Sorrell* considered the

constitutionality of Virginia laws that prohibited pharmacies from selling information about which doctors were prescribing which drugs to companies that did pharmaceutical marketing. The Court first concluded that the laws regulated protected expression more than incidentally, that the laws were both content and speaker based, and that "heightened judicial scrutiny" was warranted. *Id.* at 566–71. But rather than turn immediately to *Central Hudson*, the Court instead relied on a noncommercial-speech case to reiterate that "[i]n the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint discriminatory." *Id.* at 571 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1995)). Although the Court then applied the *Central Hudson* test, it did so without deciding whether the speech at issue was entitled only to that intermediate level of protection. *Id. See also id.* at 588 (Breyer, J., dissenting) (stating that the majority is "suggesting a standard yet stricter than *Central Hudson*").

That the regulation concerned commercial speech, the majority noted, did not change the fact that it could not withstand heightened scrutiny. *Id.* at 571. Although this Court has recognized that *Sorrell* "did not define what 'heightened scrutiny' means" and that "when a court determined commercial speech restrictions are content- or speaker-based, it should then assess their constitutionality under *Central Hudson*," it has never considered the propriety of the commercial/noncommercial distinction that the *Sorrell* Court also—

separately—left open. *1-800-411-Pain Referral Service, LLC v. Otto*, 744 F.3d 1045, 1055 (8th Cir. 2014). *See Sorrell*, 564 U.S. at 571 (declining to decide not only whether *Central Hudson* or strict scrutiny applied but also "whether all speech hampered by [the law was] commercial, as our cases have used that term").

B. There Is No Clean Way to Differentiate Commercial Speech and Other Types of Speech

Although the Supreme Court has assumed that there are "commonsense" distinctions between commercial and noncommercial speech, those distinctions are at best obscure. *See Central Hudson*, 447 U.S. at 562–63. If any categorical distinctions do exist, they are nonetheless insufficient to justify separate standards for the two types of speech. *Posadas de Puerto Rico*, 478 U.S. at 351 (Stevens, J., dissenting) ("no differences between commercial and other kinds of speech justify protecting commercial speech less extensively where, as here, the government seeks to manipulate private behavior by depriving citizens of truthful information concerning lawful activities").

1. The methods used to separate commercial from noncommercial speech are arbitrary and illogical.

The distinction between commercial and noncommercial speech has been justified, at bottom, by an assumption that commercial speech is of lower value than other types of speech, especially political speech. But this justification, rather than supporting a need for a separate standard, underscores why First Amendment

protections are so crucial *across* categories: "The First Amendment exists precisely to keep majorities from suppressing speech that they consider to be of low value." Waters, 27 Seton Hall L. Rev. at 1646; *see also Spence*, 418 U.S. at 420 (Rehnquist, J., dissenting) (criticizing commercial/noncommercial distinction and concluding that decision affirming constitutionality of statute prohibiting depiction of American flag on beer bottle as marketing tactic and decision striking down depiction of American flag on window as protest symbol could not be squared without suggestion that "political expression deserves greater protection than other forms of expression," a premise also at odds with the Court's precedent

Further, numerous examples of beneficial commercial speech belie the assumption that commercial speech is categorically of little worth. In *Discovery Network*, for example, Justice Blackmun contrasts examples of valuable commercial speech with examples of seemingly meritless political speech to "illustrate the absurdity of treating all commercial speech as less valuable than all noncommercial speech." 507 U.S. at 437 (Blackmun, J., concurring). He reasoned, for example, that "a free magazine containing listings and photographs of residential properties" was just as useful to people making the important decision of where to raise their families as the "For Sale" signs the Court had "held could not be banned" in *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 (1977). Additionally, he considered advertisements concerning "the availability of adult

educational, recreational, and social programs," which he found beneficial "to the professional and personal development of the individual." *Id.* Justice Blackmun contrasted this commercial speech with that "of the offensive, though political, slogan displayed on the petitioner's jacket" in *Cohen* v. *California*, 403 U.S. 15 (1971), concluding that the broad utility of the commercial speech was greater. *Id.* That the First Amendment gives the highest scrutiny to laws regulating false, noncommercial speech—indeed, deliberate lies—while withholding protection for truthful, nonmisleading commercial speech because of supposed relative value is, indeed, nonsensical.

Confusing matters further—and making the case for the unworkability of *Central Hudson*—Supreme Court precedents make clear that not all economic speech is commercial speech. Merely spending money to disseminate speech does not sacrifice strict-scrutiny protection. *See*, *e.g.*, *Va. Pharmacy*, 425 U.S. at 761–62 (citing *Buckley v. Valeo*, 424 U.S. 1, 35–59 (1976)); *Pittsburgh Press Co.*, 413 U.S. at 384; *Sullivan*, 376 U.S. at 266. Likewise, content-based prohibitions on profitable speech, such as books and movies, are also subject to strict scrutiny. *See Va. Pharmacy*, 425 U.S. at 761–62 (citing *Smith v. California*, 361 U.S. 147, 150 (1959); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952)). Thus, commercial *motive* alone does not constitute commercial speech. Nor, however,

can commercial speech be determined exclusively by its *content*. *44 Liquormart*, 517 U.S. at 501 (citing *Linmark*, 431 U.S. at 92–94).

Since neither motive nor content suffices to distinguish commercial speech from noncommercial speech, the Court has attempted to consider whether the speech at issue is merely a comment on a commercial transaction "removed from the exposition of ideas." *Va. Pharmacy*, 425 U.S. at 762. Yet there are few circumstances in which it could not be argued that speech promoting a sale or a product was merely a comment on the transaction. The pharmacist in *Virginia Pharmacy*, for example, could be characterized "as a commentator on store-to-store disparities in drug prices." *Va. Pharmacy*, 425 U.S. at 764–65. Even archetypal commercial speech, such as television advertisements, may not qualify as entirely removed from the exposition of ideas. For example, commentators examined the "commerciality" of a Pepsi commercial in which a:

> woman knocks on the door of [a famous actor's] apartment and asks if he has a Diet Pepsi. He tells her he does, but opens his refrigerator and discovers that he doesn't; this sets him off down the fire escape and through a series of close calls and near mishaps before he obtains a can of Diet Pepsi and returns to his apartment, soaking wet and exhausted, to give the can to his startled neighbor . . . . On one level, the commercial does not propose a transaction at all. It is a thirty-second minidrama that can stand on its own as a piece of film. At no point do any of the actors advocate that television viewers go out and buy Diet Pepsi, no one mentions any of Diet Pepsi's qualities, and the commercial does not disclose the price of Diet Pepsi or where it can be obtained. Extraterrestrial beings who should happen to intercept the commercial as the first transmission from Earth would be unable to discern that Diet Pepsi is a drink sold commercially at a price within

> reach of the average consumer. If we look at it this way, the commercial is not commercial speech at all because it does not even meet the threshold requirement of proposing a commercial transaction.

Kozinski & Banner, 76 Va. L. Rev. at 639. However, few would argue that a Pepsi advertisement is not commercial speech, despite the fact that it makes a statement about society. This example underscores the futility of attempting to articulate a standard to differentiate the categories. *See Sorrell*, 564 U.S. at 571 (declining, perhaps dryly, to decide whether speech at issue was "commercial, *as our cases have used that term*") (emphasis added).

2. A distinction between commercial and noncommercial speech is not useful.

Even if a distinction were workable, its value is unimpressive. The truth of commercial speech is neither necessarily easier to ascertain than noncommercial speech, nor does its commercial nature make it more durable than other types of speech. First, the ability to ascertain the validity of speech is not determined by whether it is commercial. Instead, it is determined by the complexity and nature of the statement. Of course, "[i]t is certainly easier to determine the truth of the claim 'Cucumbers cost sixty-nine cents' than the claim 'Republicans will govern more effectively.'" Kozinski & Banner, 76 Va. L. Rev. at 628. But such a comparison oversimplifies the matter. The former statement uses terms which are easily defined and easily measurable. On the other hand, the latter assertion is not so

clear. It must be determined what is meant by "effectively," and what metric will be used to assess the truthfulness of the statement. Although statistics can be used to justify the latter statement, it is more subjective than the former. Other commercial statements, like "America is turning 7-Up" or that "Burger King's hamburgers taste better than McDonalds' because they are charbroiled" become more subjective, as well as less conducive to a simple verification. *Id*. Similarly, many types of noncommercial speech can be easily validated and yet receive robust First Amendment protection, such as scientific speech.

Thus, the *Central Hudson* test is underinclusive. "Rational people need to listen to speech from non-commercial sources with an equal amount of skepticism" in order to discern deception. Deborah J. La Fetra, *Symposium:* Nike v. Kasky *And The Modern Commercial Speech Doctrine: Kick it up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. 1205, 1225 (2004). "Most, if not all, speakers have some self-interest, whether financial or personal, in having their views accepted by their audience." *Id* at 1225–26; *see also Jones*, 316 U.S. at 596. Shielding the public from all forms of deception would obviously be going too far. *United States v. Alvarez*, 567 U.S. 709 (2012). Subordinating protection for *all* commercial speech because *some* advertisements *might* mislead the public is likewise excessive. Strict scrutiny already incorporates the strength of the government interest and—if the government carries its burdens—can account for a

strong interest supporting a regulation banning actually, rather than potentially, misleading speech.

Contrary to what proponents of *Central Hudson* may argue, commercial speech is not so strengthened by its economic components that it is not in need of protection. Just as profit is not a true divider between commercial and noncommercial speech because "[m]uch expression is engaged in for profit but nevertheless receives full First Amendment protection," it is also not a reason to withhold protection. Kozinski & Banner, 76 Va. L. Rev. at 637. The economic interests of the speaker do not necessarily prevent government interference. Protection in these cases is just as necessary as in those cases where there is less economic motive. "Film producers, book publishers, record producers—all who engage in their chosen profession for profit—are fully protected. Profit motive is clearly not a factor very useful for classifying speech." *Id.*

3. The impossibility of articulating a distinction has inspired inconsistent and ineffective judicial rulings.

Although the Supreme Court recognizes the difficulty in clearly determining what is (and is not) commercial speech, it has not articulated a manageable standard for lower courts to follow when making decisions about the nature of the speech at issue. "Indeed, in a marketplace where principled distinctions between commercial and noncommercial speech are increasingly difficult to make, the whole skein of the *Central Hudson* test begins to unravel." *Commercial Speech,*

107 Harv. L. Rev. 224, 231 (1993). Proponents of the *Central Hudson* test emphasize that the key difference is that the "classic commercial proposition directed toward the exchange of services rather than the exchange of ideas." *Bigelow v. Virginia*, 421 U.S. 809, 831 (1975) (Rehnquist, C.J., dissenting). As we have seen, however, it is rarely that simple. *E.g.*, *Va. Pharmacy*, 425 U.S. at 765.

The application of *Central Hudson* is falling short of what it was intended to do: protect complete and accurate speech to and for the public. Although it is clear to courts that the *Central Hudson* standard "permits more regulation than the analogous standard for noncommercial speech," courts have been able to discern little else. Kozinski & Banner, 76 Va. L. Rev. at 631. "[T]he cases have been able to shed little light on *Central Hudson*, aside from standing as ad hoc subject-specific examples of what is permissible and what is not." *Id.* The previous cases essentially only have demonstrated that the

> government *cannot* prohibit certain sorts of commercial billboards, but *can* prohibit the unauthorized use of certain words altogether. Government *cannot* prohibit the mailing of unsolicited contraceptive advertisements, but *can* prohibit advertisements for casino gambling. Government *cannot* require professional fundraisers to obtain licenses, but *can* prohibit college students from holding Tupperware parties in their dormitories.

Id. (emphasis added). Just about the only thing that is clear is that "[u]nless a case has facts very much like those of a prior case, it is nearly impossible to predict the

winner." *Id.*[6] Far from disapproving content-based regulations, this kind of subject-by-subject approach actually encourages content-based distinctions while multiplying litigation.

"In light of the vague definition of what commercial speech entails, it seems the court will be faced with a difficult task every time it must decide if commercial speech is involved." Scott Wellikoff, *Note: Mixed Speech: Inequities That Result From An Ambiguous Doctrine*, 19 St. John's J.L. Comm. 159, 178 (2004).

4. With greater constitutional protections for commercial speech, legislatures will enact regulations more directly targeting the behavior (not speech) they find undesirable.

In the absence of the ability to ban truthful speech as a proxy for making underlying changes, the government will have to address these issues directly. This will hold the government accountable to constituents for those policies. "[A] ban on speech could screen from public view the underlying governmental policy." *44 Liquormart*, 517 U.S. at 500. In the case of limiting nonmisleading alcohol advertisements, as here and as in *44 Liquormart*, governments sought to limit

---

[6] Even the lower courts have expressed discomfort with *Central Hudson*. *See BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 511 (6th Cir. 2008) (Daughtrey, J., concurring in part) ("Although the United States Supreme Court has recognized a 'commonsense' distinction between commercial speech 'and other varieties of speech,' this case exemplifies the lack of clarity in such a distinction."); *Nordyke v. Santa Clara Cty.*, 110 F.3d 707, 712 (9th Cir. 1997) ("To repeat, the *Central Hudson* test is not easy to apply."). *See also Discovery Network*, 507 U.S. at 419 ("This very case illustrates the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category."); *Edenfield*, 507 U.S. at 765 ("ambiguities may exist at the margins of the category of commercial speech"); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 637 (1985) ("the precise bounds of the category of . . . commercial speech" are "subject to doubt, perhaps").

irresponsible and excessive drinking. This is not the direct result that they expect, however. Instead, they hope that these limitations will result in a decrease in liquor sales, *thus resulting* in fewer alcohol related dangers for its citizens. In reality, the advertisements are not doing the harm; the liquor sales are. Rather than make the unpopular choice to limit alcohol sales, the government has chosen to shield themselves through an indirect, and arguably ineffective, solution (explained below). The *Central Hudson* test allows legislatures to sacrifice free speech in order to protect themselves from backlash and ill will.

C. The Paternalistic "Protections" of the *Central Hudson* Test Serve Only to Keep Consumers Uninformed

"The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart*, 517 U.S. at 503. The First Amendment favors dissemination of information and opinion. "[T]he guarantees of freedom of speech and press were not designed to prevent 'the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential'" *Bigelow*, 421 U.S. at 829 (citing 2 Cooley, Constitutional Limitations 886 (8th ed.)). While exposure to false and misleading speech may confuse consumers, access to true speech is imperative for consumers to make informed decisions.

"People will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them." Wellikoff, 19 St. John's J.L. Comm. at 169 (ellipsis in original) (citing *Va. Pharmacy*, 425 U.S. at 770). "Commercial speech conveys important information and plays an integral role in the consumer's process of rational decision-making when purchasing products and services." Waters, 27 Seton Hall L. Rev. at 1645. "Moreover, modern commercial messages are increasingly geared toward creating lifestyle and value choices rather than simply providing information about product attributes and prices." *Id.* "The First Amendment presumes some accurate information is better than no information, even if it is in the form of commercial speech. Despite this enhanced appreciation of commercial speech by the courts, it has yet to receive the full protection afforded many other classes of speech." Wellikoff, 19 St. John's J.L. Comm. at 169–70.

Access to commercial information affects consumers on a daily, personal level. This impact may be even more consistent and prevalent in some cases than the impacts of political speech. *Va. Pharmacy*, 425 U.S. at 763-64. This is especially true for those for whom economic decisions are particularly fraught. Censorship of the information in commercial speech "hits the hardest . . . the poor, the sick, and particularly the aged," who spend "[a] disproportionate amount of

their income" on consumer products "yet they are the least able to learn . . . where their scarce dollars are best spent. When . . . prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities." *Va. Pharmacy*, 425 U.S. at 763-64.

By shielding the public from desired commercial speech, government inhibits informed public debate:

> Generally, a biased public debate is corrected by encouraging counterspeech. This is not so in the commercial speech arena. Instead, the Court has decided on the extreme to correct commercial messages. By continuing to allow the degree of regulation associated with commercial messages, the Court abandons the traditional debate protected by the First Amendment.

Wellikoff, 19 St. John's J.L. Comm. at 186. Instead of recognizing that exposure to opposing ideas, products, and business models is imperative to a democratic society, even in the commercial sphere, continued reliance on *Central Hudson* limits opportunities for competition and creativity.

II. APPELLEES PREVAIL UNDER EITHER STRICT SCRUTINY OR *CENTRAL HUDSON*

A. The State Does Not Present a Substantial Interest for the Challenged Statute Under Either Test

Although the State presents a colorable claim that it has a health-and-safety interest in the two challenged regulations,[7] it has no such substantial interest with regard to the challenged statute. Mo. Rev. Stat. § 311.070.1, sec. 4(10) (the Statute). The State asserts supposed interests advanced by the Statute, which are "to promote responsible consumption, combat illegal underage drinking, and . . . maintain[] an orderly marketplace." Mo. Rev. Stat. § 311.015. None is sufficient. In fact, the first two have no rational connection to the Statute. The Statute's requirement that an advertisement list *multiple* retailers, rather than promoting responsible consumption and quelling underage drinking, serves—if anything—to give customers more opportunities to consume alcohol.

While the third justification may be rationally related to the Statute, it is not "substantial" under either intermediate or strict scrutiny. Where a State interest focuses on the wellbeing and protection of its citizens, it is more likely to constitute a substantial interest. The interest in an orderly marketplace does not advance such a goal. *Cf. Rubin*, 514 U.S. 485 (holding interest in health, safety,

[7] Mo. Code Regs. Tit. 11 § 70-2.240(5)(G); § 70-2.240 (5)(I). Even if the sufficiency of its interest is assumed, however, the State has not demonstrated appropriate tailoring under any applicable level of scrutiny.

and welfare was substantial); *Bolger*, 463 U.S. at 76–77 (same for facilitating parental attempts to discuss sensitive topics such as birth control); *44 Liquormart, Inc.*, 517 U.S. at 504 (same for temperance). Instead, it merely reflects the State's desire to regulate the industry in a certain way, namely by perpetuating the pre-Prohibition era three-tier system. *See, e.g., Dana's R.R. Supply v. Attorney General, Fla.*, 807 F.3d 1235, 1250 (11th Cir. 2015) (questioning substantiality of interest involved in economic regulation law). "The State's burden [in asserting its substantial interest] is not slight." *Ibanez v. Fla. Dep't of Bus. & Prof'l Reg.*, 512 U.S. 136, 143 (1994). The State does not meet its burden here.

Cases that have found that industry regulation constitutes a sufficient interest to justify a law have only done so under rational-basis review, not the more stringent intermediate or strict scrutiny. *See, e.g., North Dakota v. United States*, 495 U.S. 423, 432 (1990); *S. Wine & Spirits of Am., Inc. v. Division of Alcohol & Tobacco Control*, 731 F. 3d 799, 803 (8th Cir. 2013). The *Central Hudson* test, as well as the strict scrutiny test, require more than just a "reasonable" state interest; the interest must be substantial. And the State cannot rely on the Twenty-first Amendment to bolster its interest. The Court has held that the State control of alcohol distribution does not permit a state to violate the First Amendment. *44 Liquormart*, 517 U.S. at 516 ("[W]e now hold that the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom

of speech embodied in the First Amendment."). *See also Granholm v. Heald*, 544 U.S. 460, 486 (2005). As such, the States proffered interest does not pass muster under either the strict scrutiny or the more permissive *Central Hudson* test.

B. Even If the Government Interests Are Found To Be Sufficient, Under the General First Amendment Test, the Purported Government Interest Does Not Justify Censorship

Because the challenged laws are indisputably content based and directed at speech, in the absence of the *Central Hudson* test, courts would apply strict scrutiny. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). *See also Whitton v. City of Gladstone*, 54 F.3d 1400, 1406 (8th Cir. 1995) ("[E]ven when a government supplies a content-neutral justification for the regulation, that justification is not given controlling weight without further inquiry.").

The content-based ban on advertising sale prices of alcohol and advertising alcohol prices below the "retailer's actual cost," and the requirement that if the advertisement includes sellers, two independent sellers be listed, are not effective at limiting excessive drinking in Missouri. *See* Mo. Code Regs. Ann. Tit. 11 § 70-2.240 (5)(G); § 70-2.240 (5)(I); Mo. Ann. Stat. § 311.070.1, sec. 4(10) (together, the "challenged restrictions"). As the district court recognized, the government has

not shown any correlation between the Statute and changes in alcohol consumption. *Mo. Broadcasters Ass'n v. Taylor*, 2:13-cv-04034-MDH, at *9 (W.D. Mo. June 28, 2018) ("Further, the State offered no empirical or statistical evidence, study, or expert opinion demonstrating how these regulations further protect the State's interest"). To the contrary, evidence proffered in the district court by Appellees shows that alcohol marketing does not affect the total amount of alcohol sold in a statistically significant way. In fact, the data shows that media advertising correlates with a *decrease* in consumption. *Id.*

In addition, the challenged laws are "hopelessly underinclusive." *Reed*, 135 S. Ct. at 2231. "[T]he multiple inconsistences within the regulations poke obvious holes in any potential advancement of the interest in promoting responsible drinking, to the point the regulations do not advance the interest at all." *Mo. Broadcasters Ass'n v. Lacy*, 846 F.3d 295, 301 (8th Cir. 2017). For example, while advertisement of two-for-one specials is prohibited, marketing a happy hour would not violate the challenged restrictions. *Lacy*, 846 F.3d at 298. Marked underinclusiveness leads to the inexorable conclusion that the challenged laws do not further substantial government interests.

Not only does the censorship of alcohol advertising suppress free expression and fail to effectuate its stated purpose, but the laws cannot be "narrowly tailored" because they serve their goal—at best—indirectly. Missouri could just as easily

employ other, less restrictive alternatives, including targeted educational and awareness-building programs, additional alcohol taxes, price controls, time or place limits on purchase, or per capita limits on sales. *See 44 Liquormart*, 517 U.S. at 507. Additionally, increased penalties or robust enforcement of existing penalties for the sale of alcohol to minors would encourage vigilance among alcohol sellers. Because the challenged restrictions do not further a substantial state interest nor are they "narrowly tailored," they would not survive strict scrutiny.

The Supreme Court has repeatedly emphasized the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed*, 135 S. Ct. at 2226. Prohibitions on true, non-misleading statements withstand strict scrutiny only in extraordinary circumstances, which are not present here. The restrictions at issue here are ineffective in furthering the purported government interests of limiting excessive drinking and promoting an orderly marketplace and the restriction is greater than necessary, because they do not address the problem directly.

C. Even If the Case Is Evaluated Under the *Central Hudson* Test, the Government Cannot Show that Censorship Advances Its Asserted Interests, Nor That It Is Narrowly Tailored to Those Interests

Even though the continued vitality of *Central Hudson* is questionable, Appellees also prevail easily under intermediate scrutiny, as the district court rightly decided. The parties have agreed that the speech at issue is true, not

misleading, and pertaining a lawful activity. Assuming there is a substantial government interest in limiting excessive drinking, underage drinking, and an orderly marketplace, the analysis next turns to whether the government has met its burden with respect to the third and fourth *Central Hudson* factors. Failure by the government to carry its burden on either prong renders the challenged laws unconstitutional. *Sorrell*, 564 U.S. at 571–72 ("Under a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent with the First Amendment."). Because the government cannot show either that limiting alcohol advertisements directly curbs excessive or underage drinking nor that the challenged laws are no more extensive than necessary, it does not meet its *Central Hudson* burden and has impermissibly limited Appellees' free speech rights.

1. The State has failed to show that the challenged restrictions directly address its interests, because there is no evidence of any reduction in overconsumption of alcohol or underage drinking.

Missouri has not met its burden in showing that the challenged restrictions serve its asserted interests in limiting overconsumption, curbing underage drinking, and promoting an orderly marketplace. *See Lacy*, 846 F.3d at 299 (citing *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999)). This prong requires that a speech restriction provides more than "ineffective or remote support for the government's purpose." *Greater New Orleans*, 527 U.S. at 188. Instead, the State must show "that the price advertising ban [has] *significantly* reduce[d]

alcohol consumption." *44 Liquormart*, 517 U.S. at 505 (emphasis added). There is no evidence that the challenged restrictions are effective even when enforced; in any event, the State enforces the challenged restrictions inconsistently, precluding a direct advancement of its interests. *Taylor*, 2:13-cv-04034-MDH, at *10.

To prevail on the third prong of the *Central Hudson* test, the State must do more than assert a "mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Rubin*, 514 U.S. at 487. Plaintiffs have shown that advertisements of alcohol do not statistically impact the total amount of alcohol sold. In fact, evidence shows that media advertising correlates with a decrease in consumption. *Taylor*, 2:13-cv-04034-MDH, at *9. The State failed to produce any evidence to contradict these findings. *Id*. As such, it cannot now show a relationship between alcohol advertising and consumption rates or underage drinking.

The State also fails to show a direct relationship because the enforcement and internal breadth of the challenged restrictions are inconsistent. *Lacy*, 846 F.3d at 301. For example, while advertisement of two-for-one specials is prohibited, marketing a happy hour would not violate the challenged restrictions. While beer and wine manufacturers cannot disseminate "consumer cash rebate coupons," other

liquor manufacturers are so permitted. Not only is the ban of advertisement of weaker alcohol in favor of stronger alcohol inconsistent, it is also illogical. Additionally, even those advertisements that are supposedly censored under the challenged restrictions are not uniformly prohibited. *Taylor*, 2:13-cv-04034-MDH, at *10. An irrational restriction "cannot directly and materially advance its asserted interest." *Rubin*, 514 U.S. at 488; *accord Greater New Orleans*, 527 U.S. at 190 (holding that a restriction does not directly address the government interest where it "is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it"). Similarly, the challenged restrictions do not advance even the less-substantial State interest in an orderly marketplace because exceptions and loopholes abound. Wineries, for example, can bypass the three-tier system set forth in the Statute and lawfully advertise their retail location. (Tr. 135:25-136:3.)

2. The challenged restrictions are more extensive than necessary to further the government's asserted interest because numerous less-restrictive alternatives would be as effective.

The advertisement requirements "cannot be sustained" because the State did not "carefully calculate[] the costs and benefits associated with the burden on the speech imposed by the regulations." *Utah Licensed Beverage Ass'n v. Leavitt,* 256 F.3d 1061, 1075 (10th Cir. 2001) (citing *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 2425 (2001)). The State has at its disposal alternatives which would restrict less speech and more directly promote its interests. These include

geographically targeted educational and awareness-building programs, alcohol taxes, price controls, limiting sale to certain periods of time, and per capita limits on sales. *See 44 Liquormart*, 517 U.S. at 507. The state could also increase penalties or enforcement of existing penalties for the sale of alcohol to minors. When the "Government could achieve its interest in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002). Since there are valid alternatives that suppress substantially less speech, the government must employ those. Even under the intermediate scrutiny standard, the challenged restrictions would fail to pass muster. The Court may not yet have completely abandoned the concept of a distinct commercial-speech inquiry, but *Sorrell* nonetheless emphasized that *Central Hudson* affords significant protection against government regulation of truthful commercial speech.

Not only are the challenged restrictions ineffective and illogical, they also cannot withstand scrutiny under the First Amendment.

CONCLUSION

The *Central Hudson* test is unworkable and should be abandoned in favor of strict scrutiny for all laws that restrict speech based on its content, whether commercial or noncommercial. Nonetheless, Appellees prevail easily under

Central Hudson's more deferential standard. *Amici* respectfully urge this Court to affirm the court below.

Respectfully submitted,

/s/ Anthony E. Rothert
Anthony E. Rother
Jessie Steffan
ACLU of Missouri Foundation
906 Olive Street, Ste. 1130
St. Louis, Missouri 63101
(314) 652-3114
arothert@aclu-mo.org
jsteffan@aclu-mo.org

Gillian R. Wilcox
ACLU of Missouri Foundation
406 West 34th Street, Ste. 420
Kansas City, Missouri 64111
(816) 470-9938
gwilcox@aclu-mo.org

/s/ David E. Roland
David E. Roland
Freedom Center of Missouri
P.O. Box 693
Mexico, Missouri 65265
(573) 567-0307

/s/ Ilya Shapiro
Ilya Shapiro
Trevor Burrus
Cato Institute
1000 Mass. Ave. NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org
tburrus@cato.org

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5) because it contains 10,122 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, font size 14.

This ECF submission complies with 8th Circuit Rule 28A(h)(2) because it was scanned for viruses and is virus-free.

/s/ Anthony E. Rothert

CERTIFICATE OF SERVICE

I, Anthony E. Rothert, do hereby certify that I have filed the foregoing Brief *Amici Curiae* electronically with the Court's CM/ECF system with a resulting electronic notice to all counsel of record on December 17, 2018. Upon approval and filing of this brief, a true and correct paper copy of the Brief with updated certificate of service will be sent via first-class mail, postage prepaid to counsel of record.

/s/ Anthony E. Rothert